FILED
MAY 26 1941
CHARLES ELMORE CROPLEY
CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1940

No. 996

WOMEN'S CATHOLIC ORDER OF FORESTERS,
Petitioner,

vs.

CITY OF ENNIS, TEXAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI

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WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas, Texas — Central-4091

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STATEMENT OF THE CASE

The case from which this appeal arises originated on March 12, 1936, upon the filing of a complaint in equity by W. J. Meredith, et al., against the City of Ennis, Texas, and its officers. The complainants sued as owners of defaulted items of bonded indebtedness of the City of Ennis, instituting their suit as a class action (R. 3, 52, 127) on behalf of all holders of bonds and warrants payable from a common source, that is, the city's tax resources. Such resources were then wholly inadequate to support said indebtedness (R. 9, 111, 128). In this suit the original complainants sought the various relief which they considered necessary to enforce the legal and equitable rights

of all the city's bond and warrant holders so as to make available for them the maximum tax resources of the city on a basis of equality, one with the other (R. 2-4). Under appropriate orders the trial court took jurisdiction of all the city's funds and resources available for application upon its outstanding bond and warrant indebtedness and admonished all parties in interest to appear and file their claims on or before May 2, 1936 (R. 4-7). This warning order provided specifically that the court would, upon final hearing, ascertain, adjudicate, distribute and allocate said funds and resources among the city's creditors entitled thereto, and, in accordance with such order, was mailed to all known holders of bonds and warrants and published once a week for six consecutive weeks, the last publication being at least thirty days prior to May 2, 1936 (R. 4, 5). In the final decree in said equity case the court approved the aforesaid mailing and publication as notice to all absent interested parties (R. 5). Petitioner nowhere denies actual notice of the equity suit.

The city was represented by able counsel and strenuously contested complainants' demands (R. 109, 125) until on September 23, 1937, the parties appeared and sought the court's approval of a decree adjudicating the rights of the city and its bond and warrant creditors under a refunding arrangement involving a nominal adjustment of old interest and a par-for-par exchange of outstanding bonds and warrants for refunding bonds bearing a slightly lesser rate of interest than that borne by the obligations then outstanding (R. 21, 49, 50). The court considered the request, and after a full disclosure of all pertinent facts, and after examining into the fairness and equity of the provisions of such decree with relation to the rights of

the creditors and the city's maximum ability to pay (R. 21), the court on September 23, 1937, entered a decree wherein among other things the refunding arrangements were approved and adopted and the funds for the payment of the city's indebtedness were distributed and allocated equitably among all bond and warrant holders so that none might be preferred over others, in accordance with the notice previously issued to the effect that such would be done. The petitioner's rights under that decree are identical with the rights of all others owning obligations of the same dignity as petitioners. There was never a suggestion of any collusiveness by the parties in the entry of that decree (R. 110).

The original complainants, as well as sixteen separate intervenors (R. 8, 125) in the equity case, thereupon tendered their obligations for refunding and adjustment in accordance with the court's decree, with the result that at the present time out of $497,000.00 principal amount of bonds and warrants, all have come in under the court's decree and refunding arrangements save and except those owned by petitioner in the aggregate principal amount of $25,000.00 (R. 50). In other words, the owners of approximately 95% of the city's outstanding bond and warrant indebtedness have complied with the court's decree.

Many holders whose obligations were not approved for participation in the refunding under the original decree came in later upon application for supplemental decrees, seeking the benefits of the refunding adjudged under said original decree. The court had retained jurisdiction specifically for this purpose, that is, to determine whether the claims of absent parties might thereafter be exchanged

for refunding bonds, and to determine the rights of any such claimants in the funds on hand for that purpose (R. 48).

On October 7, 1938, approximately two years and eight months after the institution of the equity proceedings and more than one year after the entry of the equity decree, the petitioner here filed its complaint against the City of Ennis in the same court in which the equity suit was lodged, and this became known as "Civil Action No. 10" on the docket of that court. In this independent action the petitioner sought judgment upon matured items pertaining to its bonds and demanded relief with regard to the use of funds and allocation of taxes contrary to the disposition thereof prescribed by the decree in the equity case. At the conclusion of the trial of Civil Action No. 10, the court announced that under the circumstances he considered that petitioner was bound by the equity decree (R. 52), but further announced that if petitioner considered itself right in its contentions as against the judgment of the court, the court would dismiss the civil action and petitioner could appeal from such order of dismissal (R. 57). Upon petitioner's request the court allowed it time in which to choose between the resulting alternatives (R. 57), that is, between an order dismissing Civil Action No. 10, from which petitioner might appeal and obtain a review of the court's judgment, and an order designating petitioner's suit as an intervention in the equity case affording petitioner the same relief as granted other holders in that case (R. 57). Subsequently, petitioner announced its election to accept the second alternative (R. 57), and thereupon formal judgment was entered in Civil Action No. 10, providing that same might be certified into the

equity case wherein petitioner had the right to participate, granting appellant an opportunity by appropriate proceedings in said equity case to demonstrate that the decree was improper, unfair or improvidently entered with regard to the levy, assessment and collection of taxes in respondent city and the refunding agreement therein approved as same affected petitioner, and providing that the decree should stand reopened if petitioner should succeed in this (R. 59, 61). *Petitioner did not prosecute an appeal from this judgment and same has long since become final and is now res judicata as to all claims asserted by petitioner in the civil action.*

Thereupon, petitioner filed an intervention and motion to modify the equity decree, asserting the same demands for relief as it had contended for in the civil action (R. 51, 64-79). The court, upon a hearing of the intervention, held that petitioner's motion to modify should be overruled; that the relief sought in its petition should be denied; and that petitioner should have its participation in the funds and resources of the city under the terms of the equity decree as and when it should see fit to accept same (R. 113). At the hearing it was demonstrated (R. 100, 101) and the court found (R. 111) that the city was unable to pay its obligations as same existed prior to the equity decree had it not been for the refinancing approved therein, and that the affairs of the city were rehabilitated by reason of such refinancing. *The petitioner assigned no error to this finding.* The court further found that petitioner had failed to demonstrate that the equity decree was wrongly entered as specified by the court and agreed by petitioner in Civil Action No. 10 as the only condition upon which the decree

should be reopened (R. 110). *The petitioner assigned no error to this finding.*

The Fifth Circuit Court of Appeals' opinion filed December 12, 1940 (R. 123-128), affirmed the judgment of the District Court and is now reported in 116 Fed. (2d) page 270.

The petition and brief upon which is rested petitioner's hope that this court may grant certiorari are devoid of discussion as to the primary reason under which, aside from the others named, the Court of Appeals considered that it must affirm the judgment of the District Court. This compelling reason is, that since petitioner reserved no exception and declined to appeal from the judgment in Civil Action No. 10, and voluntarily elected to pursue a course inconsistent with appeal and contrary to its position and contentions on appeal, it waived any errors that might be present in the judgment; that it elected to accept a judgment allowing intervention in the equity case and is bound by that election (R. 127)—and, strangely enough, the petitioner does not mention, much less undertake to distinguish, the authorities upon which the Court of Appeals based its decision.

SUMMARY OF ARGUMENT

1. The decision below is right because the court correctly held that by failing to take and prosecute an appeal from a judgment adverse to its claims in the civil action petitioner waived its right to do so; that by declining to appeal from the judgment entered pursuant to its election in Civil Action No. 10, petitioner waived any errors which might have been present therein; that by voluntarily

electing to proceed in the equity case, assuming the burden of demonstrating that same was wrongfully entered as a condition to opening the equity decree, petitioner became bound by that decree upon the trial court's finding that such condition had not been met and there being no error assigned to this finding in the Court of Appeals.

2. The decision below is right because the court correctly held that the original equity suit was properly a class action and the decree therein binding upon all members of the class represented, including petitioner, who could not thereafter re-litigate issues already litigated in a proper action.

3. The decision below is right because the court correctly found that personal notice of the class suit was given to every bondholder that could be located, and that notice was given to other creditors by publication as provided by the *Judicial Code*, 28 U. S. C. A., Section 118, and held that under such circumstances petitioner cannot be heard to complain of the equities in that suit in proceedings brought more than one year after the entry of a decree therein.

4. The decision below is right because the court correctly found that the petitioner had failed to serve any party to the original equity case other than the City of Ennis, and that such other parties and those holding interests under the decree had a vital interest in maintaining and should have been made parties to any action seeking to set aside the decree.

ARGUMENT

POINT 1

At the close of the hearing on petitioner's complaint in Civil Action No. 10, the trial court made it plain that the following two alternative courses or choice of procedure were open to petitioner (R. 59, 61, 110):

> 1. To take a dismissal of its civil action so that it might proceed on appeal therefrom to a final determination of its demands for relief as therein set out (R. 57).
>
> 2. To intervene in the equity case and submit its demands for adjustment in accordance with the rights therein prescribed to all bond holders.

Upon this announcement of alternatives on January 26, 1939, the trial court reassigned the case to February 1, 1939, in order that petitioner might be afforded an opportunity to consider and decide upon which of the alternatives it desired to pursue. On the day assigned petitioner voluntarily announced its election of the second alternative (R. 57), and the court then announced that petitioner should have judgment on its obligations for certification into the equity case where it might participate in the funds set aside for its benefit, and that the decree in the equity case should stand reopened only upon certain named conditions (R. 59).

Formal judgment was accordingly entered in Civil Action No. 10 on February 20, 1939, and therein the following appears:

> "That the decree entered in the aforesaid equity cause shall stand reopened if and when plaintiff (petitioner) by appropriate proceedings in said cause seeks the right to demonstrate to the court that said

> decree is improper, unfair or improvidently entered with regard to the levy, assessment and collection of taxes in respondent city and the refunding agreement therein approved, as same affects this plaintiff" (R. 61).

Petitioner reserved no exception to that judgment, has taken no appeal therefrom, and in addition has waived or released any errors which might be present therein by electing to pursue a remedy inconsistent with appeal. *Shawver v. Masterson*, 65 S. W. (2d) 1111, error dismissed; *Winters Mutual Aid Association v. Readin*, 49 S. W. (2d) 1095. Consequently all questions and demands for relief inconsistent with the judgment entered in Civil Action No. 10 became res judicata and by virtue of such judgment petitioner reserved to itself only the right to reopen the equity case upon the condition expressed by the judgment in such civil action entered pursuant to the alternative voluntarily chosen by it and in which it acquiesced. Petitioner agreed that it should be bound by the equity decree if it failed to meet those conditions. Upon trial of its intervention in the equity case the lower court found that petitioner had so failed (R. 110, 111). *No specification of error was assigned to this finding upon appeal to the circuit court* (R. 115-119). Under such circumstances petitioner released or waived any error which it might otherwise have asserted directed to this finding of the trial court and petitioner was then concluded by the trial court's judgment on its intervention in the equity case and became bound to accept the same measure of relief as is afforded all bond creditors under the equity decree. In other words, petitioner waived the only question open for decision in this appeal, namely: whether the trial court erred in finding that petitioner had failed to meet the only conditions upon which it had agreed

it might be entitled to reopen the equity decree and receive relief different from that decreed to and accepted by all other bond and warrant creditors.

The numerous authorities on the meaning of the term "waiver" are unanimous in holding that it is a voluntary relinquishment of a known right; that it is a voluntary act and implies an election to dispense with something of value, or to forego some advantage which might have been demanded and insisted upon. 27 *R. C. L.* 904; *State v. Brown*, 64 S. W. (2d) 841; *Mitchell v. Kemp and Burpee Mfg. Co.*, 218 Fed. 843; *Pokegama Sugar Pine Co. v. Klamath R. L. & I. Co.*, 76 Fed. 34; *Hyde v. Kiehl*, 183 Pa. 414, 38 Atl. 998; *Marine Iron Works v. Wiess*, 148 Fed. 153; *Johnson v. First National Bank*, 117 N. E. 676, 678.

In the instant case the waiver asserted by respondents has been effected by a voluntary act, also an election, with knowledge supported by legal advice to dispense with or to forego an advantage or right which petitioner might have demanded and insisted upon, that is, to appeal the claims asserted in the civil action.

Petitioner participated as an actor in procuring the order which it now seeks to avoid, and took its chances. To that end there was not only acquiescence on its part but intelligent dealing with the matter and consent to the judgment. By this consent it must be deemed to have made its election and should be held to it. *State v. Brown*, 64 S. W. (2d) 841, 848.

The Court of Appeals, giving effect to the authorities above cited, held that petitioner might have appealed from a judgment adverse to its claim in Civil Action No. 10, but had waived its right to do so and released any errors which

might be present in that suit by voluntarily electing to pursue a course inconsistent with appeal and contrary to its then position and contentions on appeal; that it elected to accept a judgment allowing intervention in the equity case and is now bound by that election (R. 127). Naturally, the Court of Appeals considered that the District Court's finding that petitioner had not met the conditions of the intervention was correct for no error was assigned to such finding (R. 115-119).

POINT 2

The original equity suit was properly brought and adjudicated as a class action, resulting in a decree conclusive as to all members of the class. Those who brought the suit set up the same claims as other members of the class in like situation could have asserted, and petitioner neither alleged nor proved any inadequacy in the complainant's representation. The common or general interest of all bond and warrant holders lies in the fact that their obligations are payable from a common source, that is, the city's authority to levy taxes therefor, and all of such obligations are of equal standing, one with the other, as charges against such taxing power. *Bankers Life Co. v. City of Littlefield, Texas*, 93 F. (2d) 152; *Supreme Forest Woodmen Circle v. City of Belton, Texas*, 100 F. (2d) 655. Petitioner asserts no claim which would or could have been decided differently in the equity action.

To remove itself from the maxim that equity is equality, petitioner complains that the court's decree in the equity case impairs its contract rights by taking away the funds and taxing powers pledged for its bonds. It does not take away, on the contrary it adjudges the extent of such funds

and taxing powers and apportions them. In every instance where bonds and warrants are issued in Texas the ordinance prescribes specific taxes for their payment. In this case, however, subsequent to the issuance of the obligations, the city's resources diminished to a point where it was impossible for it to carry out the provisions of the authorizing ordinances. All of said obligations constituted liens against the city's authority to tax as prescribed by the Constitution and laws of Texas, and it was necessary that the obligation holders call upon a court of equity to distribute those resources, then inadequate, so that all might receive their just share. This was by no means a novel circumstance, for the same conditions had necessitated similar action in many other instances in Texas.

The authority of the Court of Equity to prorate resources of a city which are inadequate to meet all obligations in full has long been established in Texas, beginning with the Supreme Court's decision in the case of *Voorhies v. City of Houston*, 7 S. W. 679, wherein Chief Justice Stayton wrote:

> "If there be a fund to which more than one creditor is compelled to look as the only source from which the claims can be paid and this is insufficient to pay all in full, then it is manifestly just, none of the claims having a preference, that the funds should be distributed pro rata."

In *Supreme Forest Woodmen Circle v. City of Belton, Texas*, 66 S. W. (2d) 439, a Texas court denied petitioner's contention that a Court of Equity does not have jurisdiction to administer the resources of an insolvent city. In that case the court occupied the same position as administrator of the city's diminished resources as the lower court

in this case and for the same reasons. In that case the Texas court held that a party to an action by creditors against the City of Belton in the Federal Court was bound by a judgment in the Federal Court giving directions as to the city's handling of money though not a party to the application to have the court direct the levy of a city tax and allocate its expenditure.

The basis of statutory permission for class actions is that otherwise justice might never be done if it were necessary to join all parties with interest in the subject matter or the object of a suit. In the present case justice could only be done by a Court of Equity determining the extent of resources available for the payment of the city's obligations and by an allocation of those resources among all creditors possessing equal rights and interests therein.

There are practical reasons for saying that the court can make its decree in a class suit effective and not have to retry the case at a later date when the members of the class who brought the suit must necessarily have set up the same claims and defenses as all absent parties in like situation with them. In the Court of Appeals petitioner rightly admitted that since the case of *Supreme Tribe of Ben Hur v. Cauble,* 41 S. Ct. 338, 255 U. S. 356, there is no question that absent parties may be bound under Rule 38 in a true class action *(Equity Rule 38)*. That case was one involving the rights of certificate holders in and to beneficial funds. The instant case is one involving the rights of bondholders, the beneficial owners of tax resources in and to such resources. In the *Ben Hur case* this court holds that a final decree in equity determines all rights in a fund over which the court has assumed juris-

diction in a class action and is conclusive as to actual parties as well as those who come in after a decree.

A decree in a class action affecting funds over which the court has assumed jurisdiction may not be res judicata as to the amount or validity of their claims but is to the extent that it affects the funds within the court's control. Petitioner has pointed out that the court in the equity decree expressly reserved jurisdiction for the adjudication of claims not represented at the time of the entry of such decree. Petitioner then says that by reason of this the court recognized that other claimants should have the right to come in later and assert their demands for full payment; that is to say that absent claimants should be allowed to later appear and interfere with the administrative orders of the court by demanding an allocation of funds and taxing power for their securities different from that already adjudged by the court and in a manner which would allow them to take advantage of the betterment created by and grant them a preference over others holding obligations of equal dignity.

Rarely should administrative orders and decrees rendered prior to intervention be set aside at intervenor's behest, especially unless a clear case is made out that such prior order and decree would deprive intervenor of substantial rights which he has not been remiss in pressing. *U. S. v. California Coop. Canneries*, 279 U. S. 553, 49 S. Ct. 423; *Union Trust Co. v. Jones*, 16 F. (2d) 236, 239. In its decree the Equity Court in this case retained jurisdiction only to adjudicate the validity of unpresented claims before determining their right to participate in the funds and resources of the city within its control. This in-

terpretation is borne out by the trial court's judgment on petitioner's intervention in the equity case.

Respondents are aware that there is no means of forcing a creditor to submit its claims for adjustment if it does not choose to do so, but this is without admitting that if it never so chooses it may not ultimately lose those claims when there is no other property out of which to satisfy them than that which is being administered by the court, nor is it admitting that when submitted such claims may not be adjusted in accordance with equitable principles already established by the court. It follows that as a member of the class for whom the benefits of the equity decree have been established, and there being, at this time, no other property or resources out of which petitioner's claims may be satisfied except in accordance with that decree, the petitioner must either take those benefits or receive nothing.

The fact that the equity decree was entered after its provisions had been acquiesced in by the city and those owning a large majority of the obligations affected does not lessen the binding effect of that decree on the members of the class dealt with. Nowhere has petitioner alleged or proven fraud or collusion in the procurement of the decree, and, as reflected by the record, the decree was entered only after a long period of litigation in which the issues involved were ably and seriously contested. In the case of *Ayer v. Kemper*, 48 F. (2d) 11 (Cert. den., 284 U. S. 639), it was held that an agreed judgment in a class action is binding upon all members of the class in the absence of a showing of fraud in its procurement. The question is further simplified by Rule 24c of the *Federal Rules*

of Civil Procedure, which provides "that a class action shall not be dismissed or compromised without the approval of the court." Here the court's approval was given and affirmed.

Petitioner contends that a bankruptcy court is the only court which has jurisdiction to force creditors to accept their pro rata share of the city's resources where same are insufficient to pay in full all creditors holding claims of equal dignity. In this we do not agree, for there is certainly nothing in the law which prohibits courts of equity from distributing the resources of an insolvent city according to equitable principles and thereafter protecting those who conform to the court's judgment from being penalized by their action. Petitioner refuses to accept this determination and asserts that the court is powerless to act in such situations.

Furthermore, contrary to petitioner's views, proceedings in municipal compositions were not available under the Bankruptcy Act at the time of the institution of the equity case. It was begun in March, 1936. The present bankruptcy laws did not become effective until August, 1937. The prior laws on the subject passed by the Congress on May 24, 1934, were held unconstitutional by the decision of this court in *Ashton v. Cameron Co. Water Imp. Dist. No. 1*, 298 U. S. 513, 56 S. Ct. 892 on May 25, 1936. An unconstitutional act is in legal contemplation as unoperative as though it had never been passed. *Norton v. Shelby Co.*, 118 U. S. 425, 442, 6 S. Ct. 1121, 1125; *Chicago, Indianapolis & Louisville Rwy. Co. v. Hackett*, 228 U. S. 559, 566, 33 S. Ct. 581, 584. This rule is applicable here.

POINT 3

The record shows (R. 4) that upon the filing of the equity suit the court entered an order taking jurisdiction over the interest and sinking funds and tax resources of the city, and at the same time ordered notice to absent interested parties. The equity suit being brought to enforce equitable liens upon and claims to property within the district where the suit was brought, the notice ordered by the court was given in compliance with Section 118, Title 28, *U. S. Code*, being published for six consecutive weeks in a newspaper of general circulation in Ellis County, Texas, and in The Bond Buyer, a financial journal of general circulation throughout the country. Such notice was also mailed to all known holders of bonds and warrants of the city. The notice admonished all creditors to assert their rights in the city's resources and stipulated that upon final hearing the court would ascertain, adjudicate, distribute, and allocate the funds and taxing resources of the city among all such parties as the court would determine to be lawfully entitled thereto according to their respective rights (R. 5, 7). The notice having been ordered and having been published in accordance with the aforesaid section of the *Judicial Code*, all absent parties became concluded by the equity decree after one year from its entry.

In *Continental Trust Co. v. Shunk Plow Co.*, 263 F. 873 (Cert. den. 40 S. Ct. 45) the buyer of county warrants, having acquired an implied trust in the warrants which had been issued in lieu of warrants held by the plaintiff, was held to have a beneficial interest in the funds raised by the county to pay them, thus entitling the plaintiff to bring suit in the district in which the county was situated

and to serve notice by publication on non-resident defendants. The court there said:

> "The conclusion is that the averments of the bill show that, within the meaning of the provisions of Section 57 (118) of the judicial code, the appellant had an equitable claim to designated personal property within the district where the suit was brought. Non-residents who are proper parties defendant to such a suit, may be proceeded against in respect to the property in question in the mode and for the purpose indicated in that statute. Jellnick v. Huron Mining Company, 177 U. S. 1, 20 S. Ct. 559. The order made for service on, or notice by publication to, the non-resident defendants was in pursuance of the requirements of the statute, and that order was complied with. This being so the above mentioned action of the court (vacating an order for service by publication, quashing attempted service, and dismissing the bill for lack of jurisdiction) was erroneous" (parenthesis ours).

This court's decision in the case of *Leadville Coal Company v. Wm. McCreery, Trustee*, 141 U. S. 475, 12 S. Ct. 28, is also authority on the proposition that when the rights of all parties interested in property within the jurisdiction of the court has been determined by a decree, and if anyone of such parties after notice fails to assert his rights or to challenge the allowances then made by the court, his rights and challenges are lost; that he has had his day in court and is concluded by the final decree. In that case this court appropriately stated:

> "Indeed, we need not fail to observe that the main scope and purpose of this appeal seem to be to re-litigate questions fully determined by the final decree appealed from and affirmed."

Also respondents suggest that when petitioner voluntarily submitted its claims to the full jurisdiction of this

equity court, never questioning the court's jurisdiction in the equity case, but pleaded to the merits of its claims, it thereby waived any question of notice or jurisdiction over it. *Ferdig Oil Co. v. Wilson*, 91 F. (2d) 857.

POINT 4

Every party to as well as those who have since acquired an interest in the trial court's decree is a necessary and indispensable party in any action seeking to set aside or modify that decree. If they are not made parties the attack is collateral and cannot be maintained. *Avant v. Brown*, 91 S. W. (2d) 426, error dismissed. It has always been a uniform holding of the courts of Texas that as against a collateral attack the recitation of due service in the judgment proper is conclusive upon such matter and cannot be contradicted by other facts, whether appearing in the record or aliunde. *Switzer v. Smith* (Tex. Com. App.), 300 S. W. 31, 33, 68 A. L. R. 377.

The trial court and the Court of Appeals properly found that petitioner had failed to serve the parties in the equity case, either plaintiff or respondent, save and except the City of Ennis, and that even if it were appropriate to disturb the decree it could not be so disturbed without notice to all parties (R. 111, 128).

Many of the present holders of bonds of the City of Ennis have purchased and acquired their holdings in the market since the entry of the equity decree (R. 88). In doing so they must be considered to have relied upon the decree and the provisions therein specified for the support of their bonds and upon the approval of the Attorney General and market attorneys, given upon the strength of said decree

and its provisions for the support of the bonds. The holders of these bonds are numerous and scattered throughout the country, and the whereabouts of many of them are now unknown to the city. Many, if not all, of the present holders of the city's bonds were never parties to the equity suit. That these other creditors are necessary and indispensable parties to any action seeking to set aside, vacate or modify the decree, is supported by the rule stated in *34 C. J. 344, Sec. 557*, as follows:

> "As a general rule, all of the parties to a judgment should be made parties to a proceeding to vacate or open it, as well as those who may have acquired interest in the judgment or under it, and therefore have an interest in maintaining it."

See also: *City of Alvarado v. Christian*, 100 F. (2d) 156.

In the case of *Rubber Company v. Williams Auto Company*, 81 S. W. (2d) 255, it is held that a court which had rendered judgment against several defendants could not by subsequently setting aside the judgment as to one, leave that judgment in effect and final as to other defendants, since the legal effect of such action would be to set aside the judgment as to all.

CONCLUSION

When analyzed in the light of attendant circumstances, it is apparent that the petitioner has from the outset elected to ignore the rights of the remaining creditors of respondent city and to await financial betterments resulting from their concessions before asserting its claims for preference over them. Under the law and equities of the case this should not be permitted, and the courts below so held.

We submit that the Court of Appeals was right in affirming the district court's judgment upon the claims demanded by petitioner's intervention, and that this court should therefore refuse petitioner's application for writ of certiorari.

Respectfully submitted,

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